No. 2497

In the United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of M. BARDE and J. LEVITT, individually and as partners as BARDE & LEVITT,
Bankrupts.

Respondent's Brief

GILTNER & SEWALL,
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The appellant's brief contains a correct statement of the facts. The only question before the court is one of statutory construction.

ARGUMENT

Four sections of the Oregon code must be considered in determining whether the dicision of the District Court was correct. We will take up each section by itself and demonstrate conclusively that these four sections are entirely harmonious, and are susceptible of only one possible construction.

We first turn to Section 222, L. O. L. This section in its first provision places a twofold limit upon the homestead. First of all, it cannot exceed 160 acres

in extent if sitpated in the country, or one block if situated in a city or town. In the second place, it shall not embrace as much as 160 acres or as much as one block, if such an amount of land, with the buildings, exceeds $1500 in value. This is what the following language in that section means, to-wit:

> "Such homestead shall not exceed $1500 in value nor exceed 160 acres in extent, if not located in town or city laid off into lots and blocks; if located in any such town or city, then it shall not exceed one block."

This portion of the section means that the right to so large an area as 160 acres or a block, as the case may be, is dependent upon the question of value; and if this large area, with the buildings, is worth more than $1500, then the area shall be cut down. But to what extent shall this area be cut down because the value exceeds $1500? The decisive answer is found in the final provision of this same section, which is unambiguous and so plain in its meaning that a child could not be excused for not understanding it. The language is:

> "But in no instance shall such homestead be reduced to less than 20 acres or one lot, *regardless of value.*"

This section is the one which fixes the extent of the *substantive right* of the debtor to a homestead. This is an important matter to be borne in mind. The sections that follow prescribe the *remedy* for the enforcement and protection of this right, and cannot possibly be resorted to for the purpose of placing any limitation upon the substantive right thus conferred

upon the debtor in the most explicit and unmistakable manner.

The obvious meaning of this section is that the debtor shall have 160 acres, or a block in extent, and no more, although the value thereof is less than $1500. This is the fundamental limitation of the right, without reference to value. But this area, if worth more than $1500, is to be cut down until the value of $1500 has been reached, provided that the cutting down of this area shall never reduce the property in extent to less than 20 acres or one lot, as the case may be. Under the plainest terms of the statute, this debtor is to have this area, *regardless of value.*

We now come to the sections which deal with the matter of *remedy* for the enforcement of the respective rights of the creditor and the debtor. These are Sections 224 and 225. Section 223 has no application to the question we are considering.

Whenever a right of homestead is claimed, two parties are interested in the determination of this right—the creditor and the debtor. The purpose of these two sections—224 and 225— is to provide the machinery for determining the respective rights of the creditor and debtor in the particular case. But the right so determined by this machinery is not any right fixed by these two sections dealing with the mere matter of procedure, but it is the right definitely and finally fixed by Section 222, in which alone can there be found any provisions determining the substantive right of the debtor, and of course, at the same time, necessarily determining the substantive right of the creditor, which is the right to take everything in payment of his claim, except the homestead, as defined and fixed by this Section 222.

What is the plain meaning of Section 224, and when does this section become operative? It becomes operative only after there has been a levy upon the homestead and a notice served on the officer that the debtor claims the premises as his homestead, describing the same. The next step is that the officer must notify the creditor of such claim. And then comes the significant provision which absolutely limits the power of the creditor to proceed further. He cannot take a single step toward the appraisement of this homestead to find out whether it exceeds $1500 in value, unless it be the fact that the homestead as so claimed by the debtor *exceeds the minimum* specified in the statute, to-wit: exceeds 20 acres or a lot, as the case may be. The statute provides:

> "And if such homestead shall *exceed the minimum* in this act, and he (the creditor) deem it of greater value than $1500, then he may direct the sheriff to select three appraisers, etc."

In other words, the legislature in Section 222 gives the debtor an absolute right to 20 acres or a lot, as the case may be, regardlesss of value. It then declares that when the homestead is levied upon, the debtor may claim it, describing the land he claims; thereupon the officer shall notify the creditor of such claim. If it appears that the property so claimed does not exceed 20 acres or a lot, as the case may be, the creditor has no power to proceed a step further, but he must acquiese in the claim made by the debtor to the property as an exempt homestead. His power to proceed does not arise unless, as a matter of fact, the homestead so claimed actually exceeds the minimum specified in the act, to-wit: the minimum in extent, which is 20 acres or a lot, as the case may be. This language does not

mean the minimum in amount, for in the very next breath the statute deals with this feature in the following explicit language:

> "And he deems it of greater value than $1500."

This means that if the land claimed exceeds the minimum in extent and the creditor is satisfied that it is worth more than $1500, he may have the appraisement made. The obvious purpose of this provision is to give the creditor the machinery for enforcing the provision in Section 222; that the creditor shall not have more than 20 acres or a lot, if the value is in excess of $1500. But this provision does not warrant the construction that if the minimum of 20 acres or the lot is in excess of $1500, then there shall be an appraisement for the purpose of cutting down the area still more. The explicit condition on which the creditor can take proceedings to have the homestead appraised is that the claim is for an amount in excess of 20 acres or a lot.

The word "same" in the phrase "and if the same exceed $1500" plainly relates to the whole homestead as claimed, and not to 20 acres or a lot of it. The meaning of the statute is that the appraisers appraise the entire property claimed to be embraced in the homestead, commencing, however, with the lot or 20 acres on which the dwelling is located. If they shall find that the 20 acres or the lot with the dwelling is worth $1500, then the sheriff must, in selling any portion of the homestead, leave to the debtor the 20 acres or lot with the dwelling thereon, and in addition enough more to make up the full value of $1500.

We now come to Section 225. This section is intended to provide the creditor with a remedy which

shall be the equivalent of, although different in form, from the remedy provided in Section 224. Its purpose is not to enlarge the remedy of the creditor, and above all things, not to enlarge the creditor's rights or cut down the rights given to the debtor by Section 222. The language is: "In lieu of the proceedings aforesaid." This language plainly relates to an *alternative* procedure and nothing else. It relates to only those cases where the debtor is claiming more than the minimum in extent. This section contains the following significant provision, to-wit:

> "And proceed to sell the homestead as he might heretofore have done."

The word "heretofore" as used in this section does not refer to a previous time, but to a provision in a previous portion of the statute. The word "heretofore" may very properly be used to express the idea that at some previous place in the writing, whatever its nature may be, matter may be found to which the clause containing the word "heretofore" relates. It is often used in this sense in a contract.

This section—225—is applicable only when the homestead as claimed by the debtor exceeds in extent the minimum specified in the statute, to-wit: 20 acres or a lot. Section 224 provides, as before stated, that the debtor may notify the officer that he claims the property levied upon as a homestead, describing it. Thereupon it is the officer's duty to notify the creditor. The creditor, however, can do nothing whatever with the situation unless the homestead as described by the debtor exceeds in extent the minimum specified in the statute; that is to say, exceeds 20 acres or a lot. In case it does so exceed such minimum, then, and only then, is the creditor authorized to take certain pro-

ceedings for the purpose of appraising the property and selling part of it in a proper case. Therefore, when Section 225 declares that the creditor may "in lieu of the proceedings aforesaid" take the steps provided for in Section 225, it means merely that whenever the facts, as specified in Section 224, warrant the creditor in taking the steps specified in Section 224, such creditor may "in lieu of the proceedings aforesaid" take the steps provided for in Section 225. In other words, under both sections there is a specific limitation upon the power of the creditor to take the steps provided for in such sections; and that limitation is that the homestead, as claimed by the debtor, shall exceed in area the minimum of 20 acres or a lot. This construction harmonizes the three sections perfectly.

Section 222 gives the debtor the homestead absolutely, if it does not exceed the minimum in extent. Sections 224 and 225 prescribe the proceedings which the creditor may take; but only on the express condition that the land claimed by the creditor as a home stead *exceeds* in extent the *minimum* of 20 acres or one lot.

Section 224 doubtless has in view a situation like this. The homestead as claimed may embrace a house and three lots, with the house on one lot. Such house and lot may be worth less than $1500. The debtor claims the entire property as a homestead. The homestead as claimed, therefore, exceeds the minimum. The appraisers will value first the house and the lot on which it stands. If they find this to be worth less than $1500, then the debtor is entitled to more land. They then proceed with their appraisement; and it is the property in such a case which is in excess of $1500 in value that can be sold. In such a case the debtor would have the one lot, because that is his absolute

right; and he would have the additional amount of land necessary to bring the whole up to $1500 in value.

Section 225 would be probably applicable to a case like this. The dwelling is located on two lots; therefore the debtor is compelled from the very nature of the case to claim both of the lots in order to claim his dwelling. This claim he has no right to make as an absolute claim, although he could lawfully claim absolutely one of the lots if the house were situated on that lot alone. When a case like this arises, the only possible test which the law can prescribe is the test of value, for in such a case it is impossible to give the debtor the dwelling and a single lot.

Counsel build their entire argument upon the supposed contradiction between Sections 224 and 225 on the one hand and Section 222 on the other hand. They contend that the later sections are inconsistent with the explicit provision contained in Section 222, which they admit is perfectly clear and unambiguous, and which they concede gives the debtor the 20 acres or the lot, regardless of value. See pages 9 and 10 of their brief.

But they urge that this clear provision must give way to the provision found in Sections 224 and 225, and in this connection they invoke the rule of law that when there is a contradiction in the statute the later provision in the order of position must control. This is a proper enough rule when it is kept within its proper limitations. But upon principle and authority such a rule can never have any application unless the later provision in the order of position in the statute is *as clear and explicit* as the prior provision, with which it is claimed to be in conflict. In State v. Williams, 8 Ind. 191, it is said of this rule:

> "It is only when the subsequent clause of a statute has the combined advantage

> of *equal clearness* as well as position that it will control the former."

To same effect:

Gibbons v. Brittenum, 56 Miss. 232.

People v. McClave, 1 N. E. 235.

State v. Mulhern, 78 N. E. 407.

The court has nothing to do with the wisdom of this statute, but its sole duty is to ascertain its meaning, and when such meaning has been ascertained, to enforce the statute without regard to the question whether it is a wise or unwise piece of legislation.

The language of the court in Jacoby v. Parkland Distilling Co., 43 N. W. 52, is pertinent. In this case the court said:

> "Neither can the question of the value of the premises or what proportion that value bears to the remaining property of the debtor, be at all important so long as the premises are in area within the limit of exemption fixed by law. Unfortunately, our statute fixes no limit as to the value upon a homestead exemption. It must be confessed that such a law may be greatly abused and permit great moral frauds; but this is a question for the legislature and not for the courts."

We note further that counsel begs the question when he undertakes to influence the court by saying that "if we look at Section 222 alone, then it is possible for a debtor to retain a million dollar home, provided it is constructed on one city lot." The legislature has the power to exempt one lot worth $20,000, as well as a lot worth $1500, provided it is used as a homestead for the family. I do not think this power can be

legally questioned; therefore, "value" is not in the case. On this point I invite the court's attention to the case of Gallagher v. Smiley, 44 N. W. 187 and 189 of opinion. In this case the homestead was appraised at $200,000, but the Supreme Court of Nebraska refused to permit it to be sold or interfered with by the judgment creditors and said:

> "While it is true that, in view of the great value of the property now in dispute, the application of sound moral and business principles by defendant would require the payment of the debts against it, yet, if he prefer to hold the property and allow the judgments to remain to accumulate interest and finally sweep the whole from his heirs or legatees, we know of no legal objection to his pursuing that course. The judgment of the District Court is affirmed."

The judgment in the District Court was, in effect, that the judgment creditors had no right to interfere with the homestead or to sell it under execution.

The order of the District Court should be affirmed.

Respectfully submitted,

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